

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
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)	
Petition for Preemption of Article 52 of the)	
San Francisco Police Code Filed by the)	MB Docket No. 17-91
Multifamily Broadband Council)	
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)	

REPLY COMMENTS OF THE NATIONAL MULTIFAMILY HOUSING COUNCIL

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Summary

The comments filed in this proceeding overwhelmingly support the Petition for Preemption filed by the Multifamily Broadband Council. The National Multifamily Housing Council and many others have demonstrated that Article 52 of the San Francisco Police Code conflicts with federal law, will impede broadband deployment and infrastructure investment in multiple dwelling units (“MDUs”) and will increase prices and reduce service quality for MDU residents. Opponents of the Petition misread the law and ignore the unique constraints facing both building owners and their service providers. The Federal Communications Commission should expeditiously preempt Article 52 and prevent the passage of similarly flawed laws.

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REPLY COMMENTS OF THE NATIONAL MULTIFAMILY HOUSING COUNCIL

The National Multifamily Housing Council (“NMHC”)¹ hereby submits these reply comments in response to comments filed regarding the Petition for Preemption (“Petition”) filed by the Multifamily Broadband Council (“MBC”).² Most comments filed in this proceeding join NMHC in asking the Federal Communications Commission (“Commission”) to grant the Petition because Article 52 of the San Francisco Police Code (“Article 52”)³ conflicts with federal law, will impede broadband deployment and infrastructure investment in multiple dwelling units (“MDU”),⁴ and will increase prices and reduce service quality for MDU residents. The Commission should act quickly to preempt Article 52 and prevent the passage of similarly flawed laws.

¹ NMHC is a national association that represents the rental apartment industry. NMHC members engage in all aspects of the apartment industry, including ownership, development, management and finance. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living.

² These reply comments are timely filed. *See In the Matter of Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-9, Public Notice, DA 17-356 (rel. Apr. 13, 2017).

³ Article 52 of the San Francisco Police Code, Ordinance No. 250-16 (“Article 52”).

⁴ An MDU is a centrally managed real estate development, such as an apartment building, condominium building or cooperative, gated community, mobile home park, or garden apartment. *See* 47 C.F.R. § 76.2000(b).

I. ARTICLE 52 IS PREEMPTED BY FEDERAL LAW

A. Article 52 conflicts with the Commission's bulk billing policies

Opponents of the Petition generally argue that preemption of Article 52 is not warranted because: (1) the Commission has not established a policy related to bulk billing arrangements; and (2) that Article 52 does not conflict with bulk billing arrangements. For example, the California Association of Competitive Telecommunications Companies ("CALTEL") argues that the Commission allowed bulk billing arrangements "only" because it determined that such agreements do not prevent a second MVPD from providing service to an MDU resident and wiring an MDU.⁵ The City and County of San Francisco ("San Francisco") argues that the Commission has not endorsed bulk billing arrangements, and that its decision permitting such arrangements was simply "inaction" by the Commission that does not amount to a policy.⁶

CALTEL and San Francisco mischaracterize the *2010 Exclusivity Second Report and Order*.⁷ Both CALTEL and San Francisco conveniently avoid the Commission's findings that a bulk billing arrangement is a tool that promotes competition, increases infrastructure investment in facilities such as broadband, and lowers costs for consumers.⁸ This evidences a clear Commission policy in favor of bulk arrangements, and the Commission's conclusion that such arrangements should be preserved.

⁵ Comments of CALTEL, MB Docket No. 17-91, at 3-4 (filed May 18, 2017) ("CALTEL Comments") (quoting *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, MB Docket 07-51, Second Report and Order, 25 FCC Rcd 2460 ¶ 15 (2010) ("Exclusivity Second Report and Order")).

⁶ Comments of the City and County of San Francisco, MB Docket No. 17-91, at 15-16 (filed May 18, 2017) ("San Francisco Comments").

⁷ See *Exclusivity Second Report and Order*.

⁸ *Id.* ¶¶ 2, 19, 17 n.23, 28.

The Fiber Broadband Association (“FBA”), also an opponent of the Petition, acknowledges that there is a Commission policy on bulk billing⁹ and has, in fact, praised the positive effects of bulk billing on fiber investment and consumer prices. Indeed, in 2008, FBA (then called the Fiber to the Home Council), urged the Commission to allow bulk billing arrangements. Specifically, FBA stated that “for many of these developments, the construction and operation of an FTTH network only became economically feasible because the provider was able to obtain an exclusivity or bulk-billing arrangement with the real estate developer or home owner's association. Finally, and not insignificantly, customers benefit by having lower rates.”¹⁰

There is also no merit to arguments that Article 52 does not conflict with the Commission’s policy supporting bulk billing arrangements. San Francisco, FBA, and CALTEL all rely on the Commission’s finding that bulk billing arrangements do not “hinder significantly” second MVPDs from accessing MDUs and do not prevent consumers from choosing the entrant.¹¹ CALTEL also references the Commission’s finding that bulk billing agreements do not “physically or legally prevent a second MVPD from providing service to an MDU resident and does not prevent such an MVPD from wiring an MDU for its service, subject to the permission of the MDU owner.”¹²

However, recognizing that bulk billing arrangements may not preclude MDU *owners* from allowing alternative service providers is far different than giving *residents* the authority through Article 52 to demand an alternative service provider to the property. This difference is

⁹ Comments of the Fiber Broadband Association, MB Docket No. 17-91, at 25 (filed May 18, 2017) (“FBA Comments”).

¹⁰ Comments of the Fiber-To-The-Home Council (renamed FBA in 2017), MB Docket No. 07-51, at 6 (filed Feb. 6, 2008).

¹¹ San Francisco Comments at 16; FBA Comments at 26; CALTEL Comments at 20 (citing Second Report and Order ¶ 26).

¹² CALTEL Comments at 3-4 (quoting Exclusivity Second Report and Order ¶ 15).

critical because, in the first instance, it is the MDU owners that have contracts with the service providers; in the second, Article 52 is used to abrogate those very same contracts. Indeed, bulk billing arrangements are only meaningful because they rely on the certainty that MDU owners will have the authority to allow or disallow alternative providers from offering service. Without such certainty, the benefits of bulk billing arrangements disappear for both owners and service providers.¹³ Article 52 eliminates this certainty by giving “occupants” the authority to allow service providers to provide service,¹⁴ offers MDU owners an extremely limited number of ways to dispute this authority,¹⁵ and raises the prospect of severe penalties for MDU owners if they are found to have denied a service provider access in violation of Article 52.¹⁶ As a result, Article 52 conflicts with the Commission’s bulk billing policies and should be preempted.

B. Article 52 conflicts with the Commission’s inside wiring policies

San Francisco and FBA argue that state and local mandatory access laws such as Article 52 have routinely been upheld, and that the Commission would be acting against precedent if it preempts Article 52.¹⁷ However, Article 52 is not a typical mandatory access law and should not be scrutinized in the same context as other mandatory access laws.¹⁸ Article 52 goes far beyond the mandatory access laws referenced by San Francisco by imposing on MDU owners mandatory wire sharing by allowing the resident’s chosen service provider to “use **any existing wiring** to

¹³ Comments of Consolidated Smart Systems, LLC, MB Docket No. 17-91, at 3 (filed May 11, 2017) (“Consolidated Smart Systems Comments”); Comments of the National Multifamily Housing Council, MB Docket No. 17-91, at 7-8 (filed May 18, 2017) (“NMHC Comments”).

¹⁴ Article 52 § 5201.

¹⁵ Article 52 § 5206.

¹⁶ Article 52 §§ 5210-13.

¹⁷ San Francisco Comments at 18-21; FBA Comments at 1.

¹⁸ The Commission has generally been skeptical of mandatory access laws, stating in 2003 that “[w]e continue to believe that mandatory access laws may impede competition in the MDU marketplace and that they tend to preclude alternative (non-cable) MVPDs from executing MDU contracts.” *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, CS Docket No. 95-184, *et al.*, FCC 03-9 ¶ 88 (2003) (“2003 Inside Wiring Order”).

provide communications services.”¹⁹ As explained in the Petition and NMHC’s comments, a mandate to share wiring conflicts with the Commission’s inside wiring policies.²⁰ In contrast, the mandatory access laws referenced by San Francisco and FBA ensure that a franchised cable operator (who makes a considerable investment in facilities and infrastructure to effectively cover an entire franchised service area) can access MDU residents and has the opportunity to benefit from its franchise agreement.

San Francisco, FBA, and CALTEL assert that Article 52 does not mandate wire sharing, but they fail to offer persuasive arguments to counter a plain reading of the ordinance. CALTEL states that a “reasonable reading” of Article 52 is that it does not require wire sharing because “there is no technically-feasible means for two providers to share coaxial cable inside wire without incurring significant degradation of both of their services.”²¹ While technically correct regarding coaxial cable, CALTEL conveniently ignores that there are other types of inside wiring used in MDUs, including fiber and Category 5, 5e, and 6 twisted pair. Such wiring, in fact, may be accessible for sharing when paired with certain technology, creating both technical and practical problems.

CALTEL further asserts that Article 52 does not mandate wire sharing because a building owner is required to make existing wiring available “only if the existing wiring is idle or an existing service using the wiring is being disconnected and replaced with a new service.”²² This interpretation ignores the operational realities of MDU wiring and the technical capabilities of MDU owners. Most wiring closets in MDUs are a patchwork of cables that the building owner

¹⁹ Article 52 § 5201 (emphasis added).

²⁰ Petition at 14-20, 26-32; NMHC Comments at 3-5.

²¹ CALTEL Comments at 3.

²² CALTEL Comments at 3.

relies on existing service providers to navigate. It is therefore impractical to assume that owners will be able to determine whether wiring is “idle” or “disconnected and replaced.” Moreover, an existing service provider will not provide such status to protect its customer’s privacy. Also, many apartments are occupied by more than one person, making it extremely unlikely that an owner could determine which wire goes where, whether it is in use, for what service(s), and for which resident(s).

San Francisco argues that Article 52 “recognizes the Commission’s concern about such sharing by allowing property owners to refuse a request to share existing wiring when it is not technically feasible.”²³ But this argument greatly overstates a property owner’s authority under Article 52. Indeed, the actual language of Article 52 does not reference “technical limitations.”²⁴ Rather, it discusses “physical limitations,” and “a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property.”²⁵ These provisions do not simply allow property owners to refuse access to alternative service providers who request wire sharing, and ignore the potential degradation of service quality that may result from permitting such access.

San Francisco also makes unrealistic assumptions about the technical abilities of MDU owners by assuming that owners will have the expertise to identify when use of existing wiring is technically infeasible. As discussed above, owners rely on service providers for maintenance and operation of wiring and do not have the ability themselves to identify technical infeasibility. It is therefore impractical to assume that owners will be able to rely on their assessment of technical infeasibility to refuse resident requests for wire sharing with alternative providers, and

²³ San Francisco Comments at 26.

²⁴ Article 52 § 5206.

²⁵ Article 52 § 5206(b)(3),(5)(C).

equally impractical to expect that alternate providers and residents will simply accept the owner's assessment.

San Francisco also argues that Article 52 does not conflict with the Commission's 2003 *Inside Wiring Order* because Article 52 only applies to property owners, not MVPDs.²⁶ In that Order, the Commission denied a proposal to require incumbent MVPDs to share their home run wiring with competitors because the record indicated there were "significant unresolved technical problems."²⁷ However, San Francisco fails to address how the "significant unresolved technical problems" have been resolved, or how MDU owners will resolve technical problems that MVPD companies could not. As a result, Article 52 should be preempted because it conflicts with the Commission's inside wiring policies.

C. Article 52 is preempted under field preemption

FBA and CALTEL argue that Article 52 is not preempted under the doctrine of field preemption because the ordinance does not impose mandatory wire sharing, and it is technically infeasible for two providers to share coaxial cable inside wiring.²⁸ These arguments fail because, as discussed above, Article 52 imposes mandatory wire sharing under a plain reading of the ordinance. Importantly, Article 52 requires sharing not only of coaxial cable inside wiring, but also inside wire covered under the telecommunications regulations.²⁹

San Francisco argues that Article 52 is not preempted under field preemption because "[t]he courts have consistently found that the FCC's regulation of a particular issue is insufficient

²⁶ *Id.*

²⁷ San Francisco Comments at 23; 2003 Inside Wiring Order ¶ 88.

²⁸ FBA Comments at 22-23; CALTEL Comments at 23-24.

²⁹ It's unclear how or whether fiber inside wiring would be covered under Article 52, since it does not fit neatly within the cable or telecommunications inside wiring regulations; and, in other use cases, the Commission has resisted requiring sharing of fiber facilities. See 2003 Inside Wiring Order; Exclusivity Second Report and Order.

to establish field preemption.”³⁰ However, San Francisco concedes in a footnote that the Tenth Circuit found that the Commission evinced an intent to occupy the field with respect to radio frequency interference in *Southwestern Bell Wireless* despite the local government’s authority to regulate zoning.³¹ In that case, the Court held that a county zoning ordinance governing radio frequency interference to public safety radio operations went beyond the county’s traditional zoning authority and into radio frequency interference, a field occupied by the Commission.³² Similarly, here, San Francisco went beyond its authority when it mandated wire sharing in Article 52.³³ Indeed, as explained in the Petition and NMHC’s initial comments, the Commission’s inside wiring decisions provide a comprehensive regulatory scheme that leaves no room for state or local regulation of wire sharing in MDUs.³⁴ As a result, Article 52 is preempted under the doctrine of field preemption.

II. ARTICLE 52 HARMS MDU RESIDENTS AND OWNERS

Petition supporters include a diverse group of service providers,³⁵ property developers, owners and asset managers,³⁶ and trade associations.³⁷ Most importantly, these comments

³⁰ San Francisco Comments at 25.

³¹ *Id.*; *Southwestern Bell Wireless Inc. v. Johnson Cnty. Bd. of Cnty. Commissioners*, 199 F.3d 1185 (10th Cir. 1999).

³² *Southwestern Bell Wireless*, 199 F.3d at 1192-93.

³³ See Petition at 29-32; NMHC Comments at 5.

³⁴ *Id.*

³⁵ Declaration of Pat Hagan, Blue Top Communications, MB Docket No. 17-91 (filed May 19, 2017); Consolidated Smart Systems Comments; Comments of Data Stream, Inc., MB Docket No. 17-91 (filed May 18, 2017) (“Data Stream Comments”); Comments of DirecPath LLC, MB Docket No. 17-91 (filed May 18, 2017); Comments of Direct Plus, LLC, MB Docket No. 17-91 (filed May 18, 2017); Declaration of Robert Grosz, Elauwit Networks, LLC, MB Docket No. 17-91 (filed May 18, 2017); Comments of GigaMonster, LLC, MB Docket No. 17-91 (filed May 18, 2017); Comments of Privatel Inc., MB Docket No. 17-91 (filed May 17, 2017) (“Privatel Comments”); Comments of Satel, Inc., MB Docket No. 17-91 (filed May 18, 2017) (“Satel Comments”); Comments of Spot on Networks, MB Docket No. 17-91 (filed May 17, 2017) (“Spot On Comments”); Comments of Vicidiem, Inc., MB Docket No. 17-91.

³⁶ Comments of AvalonBay Communities, Inc., MB Docket No. 17-91 (filed May 18, 2017) (“AvalonBay Comments”); Comments of Camden Property Trust, MB Docket No. 17-91 (filed May 18, 2017) (“Camden Comments”); Comments of Holland Partner Group, LLC, MB Docket No. 17-91 (filed May 17, 2017) (“Holland

demonstrate the negative impact Article 52 will have on MDU residents. In particular, Article 52 will create disincentives for service providers to install and upgrade facilities.³⁸ It will also deprive residents the benefit of negotiated service level commitments between property owners and incoming service providers who may be serving only a single resident in a building, risking poor and unreliable service for not only that single resident but all residents whose service from other providers may be impacted.³⁹ There will be confusion regarding responsibility for inside wiring – leading to slower repairs and delayed maintenance, potential signal interference, increased service calls, unnecessary disconnections and damage.⁴⁰ Article 52 may also result in higher rents and higher rates for communications services as it threatens the viability of bulk arrangements and shifts more costs to building owners.⁴¹

Service providers and building owners will also be harmed by Article 52.⁴² Specifically, it undermines existing and future agreements, which may impact service providers’ ability to attract financing for the installation of communications equipment and wiring, effectively reducing competition.⁴³ Article 52 also increases the risk of litigation and fines for owners who

Comments”); Comments of Prometheus Real Estate Group, Inc., MB Docket No. 17-91 (filed May 18, 2017) (“Prometheus Comments”); Comments of RealtyCom Partners, MB Docket No. 17-91 (filed May 17, 2017) (“RealtyCom Comments”).

³⁷ See Comments of NCTA – The Internet & Television Association, MB Docket No. 17-91 (filed May 18, 2017) (“NCTA Comments”); NMHC Comments; Comments of the National Apartment Association, MB Docket No. 17-91 (filed May 18, 2017) (“NAA Comments”).

³⁸ NCTA Comments at 3; Prometheus Comments at 2; NMHC Comments at 5.

³⁹ AvalonBay Comments at 3; Privatel Comments at 4.

⁴⁰ AvalonBay Comments at 4; Camden Comments at 4.

⁴¹ Camden Comments at 8; Holland Comments at 4.

⁴² San Francisco implores the Commission not to “protect the business model favored by MBC’s members.” San Francisco Comments at 2. But then goes on to state that “the cost of replicating existing wiring can impose a barrier to entry for many competitive carriers. The City hoped to eliminate that barrier by allowing a new provider to use that existing wiring where it was feasible to do so.” *Id.* at 6. Clearly this is San Francisco favoring one business model (service providers unwilling to make infrastructure investments) over another.

⁴³ Consolidated Smart Systems Comments at 2; Data Stream Comments at 2; Spot On Comments at 3.

legitimately restrict or deny access to wiring or other building facilities.⁴⁴ Article 52 also fundamentally strips owners of legitimate property rights and their ability to freely contract.⁴⁵

The few comments opposing the petition ignore these harms and misstate the facts, particularly as they apply to the unique characteristics of providing communications services to residents of MDUs. They argue that Article 52 is necessary to foster competition and consumer choice⁴⁶, but do not acknowledge that most residential buildings are served by at least two facilities-based providers.⁴⁷ Having a choice of two internet access providers is common for residential customers – but that choice is limited to the service providers who have constructed facilities in the community.⁴⁸

Petition opponents also ignore the physical constraints of the space and equipment in MDUs; which make it difficult to accommodate unlimited numbers of service providers who may be serving only one or a few residents in a building. Telecom closets in MDUs are built to accommodate a fixed number of service providers because it does not make economic sense to devote valuable square footage for additional providers that may not materialize. The same logic applies to the media cabinets in resident apartments, which are designed for the space required, not potential expansion. In addition, service providers seek guarantees of specific amounts of

⁴⁴ NAA Comments at 10; NCTA Comments at 5.

⁴⁵ Satel Comments at 2.

⁴⁶ Comments of Engine Advocacy, MB Docket No. 17-91, at 1 (filed May 17, 2017); FBA Comments at 8; San Francisco Comments at 1.

⁴⁷ NAA Comments at 12-13; RealtyCom Comments at 3; AvalonBay Comments at 2. This does not include the multitude of over the top VoIP and video applications currently available in the marketplace including Vonage, MagicJack, Netflix, Amazon and Hulu. Alternative internet access services may be available from residents' wireless carriers' data plans, which can be used to tether to other devices.

⁴⁸ NAA Comments at 12-13; RealtyCom Comments at 3; AvalonBay Comments at 2. None of the opponents provide any evidence that the services offered by competitors will be better, faster, or cheaper than those services currently available to residents.

space as a condition of deployment,⁴⁹ and owners rely on these providers to continually upgrade, repair, and maintain highly technical systems to deliver state-of-the art services. Article 52 does not take into account these space limitations, and does not provide a means for owners to compel a new service provider to take responsibility for maintenance, repair or upgrades; ultimately it will be the residents who suffer the consequences.

CONCLUSION

For the foregoing reasons, NMHC urges the Commission to grant the Petition and preempt Article 52.

Respectfully submitted,

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⁴⁹ AvalonBay Comments at 3.